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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 28

NAH-LVH, LLC d/b/a WESTGATE LAS VEGAS RESORT AND CASINO, Petitioner, And LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872. Respondent.	Case No. 28-CC-148007 **BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ANSWER TO BRIEF TO EXCEPTIONS OF CHARGING PARTY**

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I. INTRODUCTION

This is a case about the right of the Respondent to exercise its rights under the First Amendment. The Supreme Court's most recent decision makes it plain that no law can regulate the content of signs, and that was essentially the claim of the General Counsel in this case. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2015 WL 2473374 (2015). *Reed* explicitly overrules any remaining argument that the Board can regulate the content of expressive activity under the guise of 29 U.S.C. § 158(b)(4)(ii)(B). We address that issue more fully below.

There were three different claims of the General Counsel here. We will address each of those claims separately. The ALJ rejected each of these claims.

First, the General Counsel claimed that an inflatable critter known as "Rat 2" on Paradise Road at the driveway entrance to the event center was unlawful. See Board Exhibit 1(d)–(f).

Second, the General Counsel claimed that bannering on Paradise in the area of the entrance to the Casino[1] violated the Act. See GC Ex. 3(b) and 3(h).

Third, the General Counsel claimed that four other inflatable critters violated the Act because they trespassed on property of the Casino. See GC Ex. 11(a)–(c) and (g)–(o).[2] We address each of the issues found in this case below.

In its Exceptions, the Charging Party abandons claims One and Two and relies solely on the third claim: that by placing the inflatable critters on private property, the Union's conduct violated Section 8(b)(4)(ii)(B).

II. THERE IS NO PROOF THAT THE ACTIONS OF THE RESPONDENT MEET THE BOARD'S JURISDICTIONAL STANDARDS.

Respondent has admitted the commerce data but denies that either Westgate or Nigro is an employer within the meaning of the Act. We do so because the Board's Commerce standards are

[1] For purposes of this Brief, we refer to the area in dispute as the "Casino." We do so because there is, as we point out in this Brief, a dispute about who owns the property and which entity controls the property. For that reason, we use the generic term "Casino" to apply to the area but not to delineate any property or ownership rights.

[2] There was a reference to other trespass, but none was proven except for the presence of a disputed shoe in one picture. We address that issue *infra*.

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out of date and should be modified.

III. THE SECONDARY BOYCOTT PROVISIONS MAY NOT BE APPLIED WITHOUT INTERFERING WITH CORE FIRST AMENDMENT RIGHTS.

The dispute in this case is whether the Union's expressive activity violated Section 8(b)(4)(ii)(B) by coercing Westgate.[3] This case involves classic consumer expressive activity, as reflected in the Union's banner stating that there was "immigrant labor abuse by hiring A & B Environmental at the Westgate." Although the Union's dispute over the use of immigrant labor at Westgate affected employees and thus was a "labor dispute," the Union's message directed towards the public concerned only immigration and immigrant labor abuse. The Union directed no message towards Westgate or its employees. Factually, this is the most fundamental form of consumer expressive activity. We show that Section 8(b)(4)(ii)(B) is facially invalid under the Constitution and that application of Section 8(b)(4)(ii)(B) to this expressive activity violates the First Amendment in the most direct way.[4]

[3] Our First Amendment arguments need not address the constitutionality of Section 8(b)(4)(i)(B). Parts VI, VIII, and IX *infra* address Section 8(b)(4)(i)(B). Charging Party has abandoned any claim that there was coercion or inducement of employees of Westgate to cease performing work. Because there was no inducement or coercion, we need not address Section 8(b)(4)(i)(B)'s constitutionality.

[4] Because Westgate alleges trespass, it argues that the First Amendment's protections do not apply. This argument is unavailing. First, the banners were plainly on public property. Although the critters were on disputed property, as we show in Part XIII *infra*, there was no trespass. More importantly, even if one indulges the argument that trespass occurred, this makes no difference for the purposes of the Section 8(b)(4)(ii)(B)'s constitutional analysis. An alleged Section 8(b)(4)(ii)(B) violation would not be at issue unless the Union's message regarding immigrant labor abuse had a secondary object. Because a secondary object is alleged, Section 8(b)(4)(ii)(B)'s restrictions apply and thus its constitutionality is at issue.

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A. SECTION 8(b)(4)(ii)(B)'S RESTRICTIONS ON PEACEFUL SECONDARY CONSUMER PICKETING VIOLATE THE FIRST AMENDMENT AS CONTENT-BASED RESTRICTIONS ON FREE SPEECH SUBJECT TO STRICT SCRUTINY.[5]

It has been more than a generation — 35 years — since, in *Safeco*, a plurality of four Supreme Court justices summarily held that Section 8(b)(4)(ii)(B)'s restrictions on peaceful secondary consumer picketing were constitutional.[6] *NLRB v. Retail Store Employees Union, Local No. 1001 (Safeco Title Ins. Co.)* ("*Safeco*"), 447 U.S. 607 (1980). In reaching this conclusion, the Court declined to determine — and still has yet to determine — what level of constitutional scrutiny should apply to Section 8(b)(4)(ii)(B)'s restrictions on peaceful consumer picketing. Moreover, *Safeco* is of limited precedential value because it pre-dates many important developments in the Court's First Amendment jurisprudence. These cases have significantly expanded free speech protections by repeatedly striking down restrictions on picketing and other forms of expression regulating corporate, commercial, and political speech.

In this evolving area of jurisprudence, the Supreme Court's most recent First Amendment decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2015 WL 2473374 (2015), compels the conclusion that Section 8(b)(4)(ii)(B)'s restrictions on peaceful secondary consumer picketing should be considered content-based restrictions on speech that are subject to strict scrutiny.

By expressly holding that a government regulation that treats speech differently based on its content *must* be treated as a content-based regulation — and is thus subject to strict scrutiny regardless of the government's interest — *Reed* overrules the logic underpinning *Safeco. Id.* at 2226. Under *Reed* and the Court's First Amendment jurisprudence following *Safeco,* the rationales traditionally advanced in defense of Section 8(b)(4)(ii)(B)'s restrictions — such as

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[5] We are indebted to Catherine Fiske's and Jessica Rutter's forthcoming article, "Labor Protest Under the New First Amendment," in the Berkeley Journal of Employment and Labor Law, which discusses the history and impact of labor picketing restrictions in light of the Supreme Court's recent First Amendment jurisprudence. Their insights and analysis should lead to the elimination of the restrictions imposed by Sections 8(b)(4)(ii)(B) and 8(b)(7) on the First Amendment rights of workers

[6] Section 8(b)(4)(ii)(B) makes it "an unfair practice for a labor organization or its agents … (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is (B) forcing or requiring any person to cease … doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).

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peaceful secondary picketing's "unlawful purpose," the "delicate balance" of government interests, as well as speaker-, conduct-, and harm-based arguments — can neither justify evading strict scrutiny nor survive its heightened standard of review.

Were *Safeco* decided today consistent with *Reed*, Section 8(b)(4)(ii)(B)'s restrictions on peaceful secondary consumer picketing would fail as facially content-based restrictions not narrowly tailored to serve compelling state interests. Thus, Section 8(b)(4)(ii)(B) is unconstitutional.

B. THE SUPREME COURT'S DECISION IN *SAFECO* IS OF LIMITED PRECEDENTIAL VALUE.

The Court addressed constitutional concerns regarding Section 8(b)(4)(ii)(B) in *Safeco.*[7] But *Safeco* is of limited precedential value where: (1) the Court failed to expressly rule on the level of constitutional scrutiny that applies to Section 8(b)(4)(ii)(B); and (2) *Safeco* pre-dates many important developments in the Court's First Amendment jurisprudence.

Procedurally and as precedent, *Safeco* is somewhat unusual in that no rationale justifying Section 8(b)(4)(ii)(B)'s constitutionality enjoyed the support of the Court's majority. Instead, the Court issued three separate opinions: the four justice plurality's as well as Justice Blackmun's and Stevens' separate concurrences.

Safeco's four justice plurality rested its conclusion that secondary consumer picketing was unprotected under the First Amendment on its finding that such picketing was driven by an inherently "unlawful purpose," i.e., encouraging customers to no longer shop at a secondary business. The Court's two sentence summary disposition of this issue, citing a case that involved an inducement to strike (and not a consumer picket), is striking in its brevity: "[T]his Court expressly held that a prohibition on 'picketing in furtherance of [such] unlawful objectives' did not

[7] Before the LMRA first enacted Section 8(b)(4)'s statutory restrictions on secondary boycotts, the First Amendment fully protected labor picketing, including secondary picketing. In *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940), the Supreme Court held that any restriction on picketing must be "narrowly drawn" to a "clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace." More modern observers might characterize this as strict scrutiny.

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offend the First Amendment. We perceive no reason to depart from that well-established understanding." *Safeco* at 616 (citations omitted).

Neither Justice Blackmun's nor Justice Stevens' concurrence endorsed the plurality's "unlawful purpose" rationale. Both justices recognized the conflict between Section 8(b)(4)(ii)(B) and the First Amendment.[8] *See Safeco* at 617 (Blackmun, J., concurring) (noting the "plurality's cursory discussion of what for me are difficult First Amendment issues"); *Id.* at 618 (Stevens, J., concurring) (stating "[t]he constitutional issue, however, is not quite as easy as the plurality would make it seem.").

Justice Blackmun, in what has become known as the "delicate balance" argument, found that Section 8(b)(4)(ii)(B) survived First Amendment challenge because of the government's interest in preserving the "delicate balance" Congress had struck in the NLRA between the union's freedom of expression and the general public's freedom from "coerced participation in industrial strife." *Id.* at 617–18.

Justice Stevens, in what has become known as the "speech-plus" argument, introduced the concept of "signal" picketing. Reasoning that picketing is a mixture of conduct and communication, Stevens opined that in the "labor context," "the conduct element" (the picketing itself), more so than the force of the idea expressed, is what persuades customers to decline to patronize an establishment. *Id*. at 619. Because "signal" picketing calls for an "automatic

[8] As early as the Supreme Court's 1964 opinion in *NLRB v. Fruit & Vegetable Packers, Local 760* ("*Tree Fruits*"), 377 U.S. 58, 71-72 (1964) , Justice Black, in a concurring opinion, criticized the lesser protection the Court extended to labor picketing and stated that Section 8(b)(4)(ii)(B) should be held unconstitutional on First Amendment grounds.

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response" rather than a "reasoned" one, Stevens found that peaceful labor picketing was entitled to less First Amendment protection than other speech.[9]

A mere eight years after *Safeco,* in *DeBartolo Corp. v. Florida Building & Construction Trades Council*, 485 U.S. 568 (1988), the Court abandoned the *Safeco* plurality's "unlawful objective" rationale. In *DeBartolo,* the Court held that secondary boycott speech directed towards consumers was not an inherently "unlawful purpose." *Id.* at 578. Declining the opportunity to revisit the question of Section 8(b)(4)(ii)(B)'s constitutionality, the Court instead narrowly construed the statute's "threats, coercion, and restraint" provisions to permit secondary leafleting (but not picketing) and to thereby avoid any potential First Amendment conflict.[10] Thus, following *DeBartolo,* the only remaining justifications for Section 8(b)(4)(ii)(B)'s constitutionality

[9] As a practical matter, it is no longer possible to give credence to Justice Stevens' argument that a labor picket is an automatic "signal" for unrest, when the Bureau of Labor Statistics (BLS) reports that, as of 2014, unionization rates have shrunk to a mere 11%, while the number of reported work stoppages has plummeted from a peak of 470 in 1952, to a mere 11 in 2014 — the second-lowest number on record. This is also a dramatic decrease from 1980, when *Safeco* was issued. When Stevens penned his opinion 35 years ago, there were 187 work stoppages. In 1983, the first year for which comparable BLS data are available, union membership rates were nearly twice what they are today — 20%. *See* Bureau of Labor Statistics, *Work stoppages involving 1,000 or more workers, 1947-2014* (February 11, 2015), http://www.bls.gov/news.release/wkstp.t01.htm (last visited August 11, 2015); Bureau of Labor Statistics, *Union Members Summary* (January 23, 2015), http://www.bls.gov/news.release/union2.nr0.htm (last visited August 11, 2015).

[10] The Board has followed and expanded this principle in *Eliason & Knuth of Arizona, Inc.*, 355 NLRB 797 (2010) and *Sheet Metal Workers International Association, Local 15*, 356 NLRB No. 162 (2011).

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were Justice Blackmun's ("delicate balance") and Justice Stevens' ("speech-plus") concurrences.[11] Together, *Reed* and the Court's recent First Amendment jurisprudence have severely undermined both concurrences' rationales.

C. THE REASONING OF *REED V. TOWN OF GILBERT* REJECTS THE CONTENT-BASED RESTRICTIONS ON CONSUMER-PICKETING OF SECTION 8(b)(4)(ii)(B).

Before addressing *Reed*'s impact, we briefly review the distinction between content-, viewpoint-, and speaker-based restrictions on speech. Content-based restrictions, i.e., those that target speech based on its communicative content, are subject to higher constitutional scrutiny than content-neutral restrictions, i.e., those that treat speech the same because of its non-communicative aspects or regardless of what it says.[12] Thus, content-based restrictions are generally unconstitutional.

Content-based restrictions are also distinct from viewpoint- and speaker-based restrictions. Generally, viewpoint-based restrictions refer to restrictions based on the point of view being expressed — i.e., whether one is for or against a particular issue. While all viewpoint restrictions are content-based, certain restrictions may be content-based even if they are viewpoint neutral.[13] Speaker-based restrictions — i.e., bans based on who is communicating vs. what is communicated

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[11] Because the Supreme Court's rejection of the unlawful purpose in *DeBartolo* was implicit, some lower courts have continued to apply the unlawful purpose test to labor picketing. *See, e.g., United Food & Commercial Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167, 2013 WL 1289781 at 14 (D. Ariz. Mar. 29, 2013) (stating that governments may constitutionally prohibit picketing "when it is directed toward an illegal purpose" (quoting *Carey v. Brown*, 447 U.S. 455, 470 (1980)). However, the "unlawful purpose" test has been widely condemned by First Amendment scholars. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones,* 90 CORNELL L. REV. 1277 (2005); Zoran Tasic, *The Speaker the Court Forgot: Re-evaluating NLRA Section 8(b)(4)(B)'s Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 WASH. U. L. REV. 237 (2012). Even more importantly, the Court has continued to implicitly repudiate the unlawful purpose test in other cases involving picketing and expressive conduct. *See Madsen v. Women's Health Center,* 512 U.S. 753 (1994) (finding certain speech by protesters intended to violate an injunction to be protected by the First Amendment where the injunction was overly broad, and noting that while this injunction was content-neutral, if it were not, it would receive strict scrutiny).

[12] One classic example of a content-neutral regulation is a restriction on sound amplification.

[13] A ban on profanity is a classic example of a viewpoint-neutral, but content-based restriction.

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— can also be content-based or content-neutral, depending on whether the government's speaker preference reflects a content-preference.

Reed confirms that Section 8(b)(4)(ii)(B)'s restrictions should be subject to strict scrutiny as content-based restrictions. In *Reed,* the Supreme Court reversed a Ninth Circuit decision that found that a local Sign Ordinance treating "Ideological," "Political," and "Directional" signs differently was content-neutral. *Reed* issued three major findings which, taken in combination, effectively undermine any rationale for not applying strict scrutiny to Section 8(b)(4)(ii)(B).

First, under *Reed,* laws that treat speech differently based on content *must* be considered content-based restrictions *regardless of the government's interest or motivations* in enacting such laws. *See Reed* at 2227. "[A]n innocuous justification cannot transform a facially content-based regulation into one that is content-neutral." *Id.* at 2228. Thus, as discussed more extensively in Section IV.E. *infra,* traditional government interest-based justifications for Section 8(b)(4)(ii)(B), such as Justice Blackmun's "delicate-balance" argument, can no longer justify insulating its provisions from strict scrutiny.

Second, under *Reed, "*speaker-based" distinctions, such as differences based on speech by commercial or economic actors "[do] not render a distinction content-neutral." *Id.* at 2230. Thus, as discussed further in Section IV.E *infra,* the fact that Section 8(b)(4)(ii)(B) applies only to labor organizations does not convert it from a content-based into a content-neutral restriction.

Finally, under *Reed, all* facially content-based regulations must be subject to strict scrutiny. "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Thus, as discussed further in Section IV.E *infra,* as a content-based restriction, Section 8(b)(4)(ii)(B) must be subject to heightened scrutiny. There is no justification for insulating it from this heightened standard of review.

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D. SECTION 8(b)(4)(ii)(B) IS A FACIALLY CONTENT-BASED RESTRICTION SUBJECT TO STRICT SCRUTINY.

As a threshold matter, there is significant support in the Supreme Court's jurisprudence that Section 8(b)(4)(ii)(B) is a content-based restriction on speech. In *Safeco,* both Justice Blackmun and Stevens stated that Section 8(b)(4)(ii)(B) was a content-based regulation. *See Safeco,* 447 U.S. at 616–17 (Blackmun, J., concurring) (noting "the plurality's cursory discussion of what for me are difficult First Amendment issues ... on the question of whether the National Labor Relations Act's *content-based ban* on the peaceful picketing of secondary employers is constitutional.") (emphasis added); *Id.* at 618 (Stevens, J., concurring) ("[T]his is another situation in which regulation of the means of expression is *predicated squarely on its content."*) (emphasis added).

In *Reed,* the Supreme Court defined two categories of content-based restrictions: (1) "more obvious" facial distinctions that define regulated speech by "particular subject matter;" and (2) "more subtle" facial distinctions, defining regulated speech by its "function or purpose." *Reed* at 2227. Under either test, Section 8(b)(4)(ii)(B) qualifies.

1. Section 8(b)(4)(ii)(B) is an obvious facially content-based restriction.

Section 8(b)(4)(ii)(B) is an obvious facially content-based restriction. Just like the restrictive Sign Code struck down in *Reed,* whether Section 8(b)(4)(ii)(B) applies "depend[s] entirely on [the messages'] communicative content." *Id*. at 2227. In *Reed,* the Sign Code was "obviously" content-based because it treated signs conveying certain ideas differently than others:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government.

Id. at 2227.

Section 8(b)(4)(ii)(B) also treats communications differently based on their content. For example, in *NLRB v. Fruit & Vegetable Packers, Local 760* ("*Tree Fruits*"), 377 U.S. 58, 71-72 (1964), the Supreme Court interpreted Section 8(b)(4)(ii)(B) to permit picketing

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of retail stores urging consumers to boycott a single product, while proscribing pickets urging a boycott of the entire establishment. To draw the line between prohibited and permitted consumer appeals under *Tree Fruits*, courts will focus on picketers' language or signs. Do picketers' handbills and placards expressly state that protesters do not have a dispute with the entire store or market? *Id*. at 60 n.3 & 70. In essence, Section 8(b)(4)(ii)(B) is a facially content-based distinction in which secondary consumer pickets are proscribed depending on the content of the picketers' signs and message.[14]

The NLRB's long-standing Moore Dry Dock standards are another example of Section 8(b)(4) as an "obvious" content-based restriction. *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950), governs the standards the NLRB applies when evaluating whether common situs picketing – a picket at a location of both primary and secondary employers – constitutes unlawful secondary picketing under Section 8(b)(4). Under *Moore Dry Dock*, one factor the Board and the Courts evaluate when determining if a picket is a prohibited secondary activity is whether the picketers are carrying signs that indicate their dispute is only with the primary employer. *Id*. at 549–50. Once again, whether Section 8(b)(4) proscribes the activity depends on the content of the picketers' signs and message.

A third example is that if Union picketers had been carrying signs urging customers *to patronize* Westgate, Section 8(b)(4)(ii)(B) would not proscribe their speech. Similarly, if the Union picketed with signs stating, "God Hates Westgate," the conduct would have been protected. *Snyder v. Phelps*, 562 U.S. 443, 448 (2011). Finally, Section 8(b)(4)(ii)(B)'s restrictions would not have applied if the Union had expressed opposition to Westgate's environmental practices, the immorality of gambling, or picketed in support of a national "Day of Action" on climate change, breast cancer, or any other number of causes.

[14] The requirement that the Union state it has no dispute with the market (or "neutral" entity) regulates not only the content of the Union's speech, but also acts as a form of compelled speech. The Union must affirmatively disclaim that the dispute is with the "neutral" market even though the market is not entirely neutral as an entity affected by the boycott. *Id.* at 84.

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Although in all these examples, determining whether the Union's picketing was directed towards a prohibited secondary purpose only requires the most "cursory examination" of the speech in question, *Reed* expressly rejected this as a basis for finding that a regulation was not content-based. *Reed* at 2226, 2227. Under *Reed,* whenever the Court must analyze a message's content to determine if a speech restriction applies, that restriction is an obvious content-based restriction. Thus, Section 8(b)(4)(ii)(B) qualifies as an obvious content-based restriction.

2. Section 8(b)(4)(ii)(B) is a "subtle" facially content-based restriction.

In any event, whether Section 8(b)(4)(ii)(B) qualifies as an obvious facial distinction may be moot. Under *Reed,* both subtle and obvious distinctions trigger strict scrutiny; and it is inarguable that Section 8(b)(4)(ii)(B) is a subtle facial distinction. Subtle facial distinctions define speech by their purpose or function, and are the essence of Section 8(b)(4)(ii)(B), which requires a purpose-based inquiry into the object of the Union's picketing. For example, under Section 8(b)(4)(ii)(B), a picket that would be perfectly permissible when directed against a primary employer is prohibited when directed against a secondary employer.

Moreover, if Union protesters at Westgate had been carrying ambiguous signs that stated "Westgate Mistreats Its Employees" and could support either a primary or secondary purpose, then the court would be required to examine picketers' motives in bearing such signs. This motive might be established from other conduct, such as express statements that the real purpose of the picketing was to coerce Westgate for secondary purposes. Thus, Section 8(b)(4)(ii)(B) also functions as a subtle facial distinction that regulates the purpose or function of the Union's speech.

E. NONE OF THE RATIONALES ADVANCED IN DEFENSE OF SECTION 8(b)(4)(ii)(B)'S RESTRICTIONS JUSTIFY INSULATING IT FROM STRICT SCRUTINY.

Reed and the Supreme Court's First Amendment jurisprudence following *Safeco* remove any doubt that the primary rationales advanced in defense of the constitutionality of restrictions on Unions' peaceful consumer picketing — namely, Justice Blackmun's "delicate balance" argument as well as the "speaker-" "conduct-" and "harm-based" rationales in Justice Stevens' "speech-plus" argument — justify insulating Section 8(b)(4)(ii)(B) from strict scrutiny.

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1. Delicate Balance Rationale

Were Justice Blackmun's "delicate balance" argument offered today to justify Section 8(b)(4)(ii)(B)'s constitutionality, it would not satisfy *Reed*. In proffering the "delicate balance" argument, Justice Blackmun is essentially committing the same error for which the Supreme Court in *Reed* reversed the Ninth Circuit Court of Appeals. Because an "innocuous justification cannot transform a facially content-based law into one that is content neutral," once a law is found to be content-based, a strict scrutiny analysis must be applied. *Reed* at 2228. Thus, Justice Blackmun's "delicate balance" argument cannot convert Section 8(b)(4)(ii)(B) from a content-based into a content-neutral restriction, or even lessen the degree of scrutiny to which the "delicate balance" of government interests must be subjected. Under *Reed*, any government interest in striking a "delicate balance" must be first rigorously evaluated under strict scrutiny.[15]

2. Speaker-Based Rationale

Justice Stevens' "speech-plus" argument draws from a "speaker-based" distinction implying labor organizations' speech is worth less because it reflects economic interests. *Reed* rejects any argument that such distinctions insulate Section 8(b)(4)(ii)(B) from strict scrutiny.

Citing *Citizens United*, *Reed* emphasizes that speaker-based distinctions do not automatically render speech restrictions content-neutral: "Because '[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,' … we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" *Id.* at 2230 (quoting *Citizens United* at 340 and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)). "[A] content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out

[15] We also note the Court's willingness under its more recent First Amendment jurisprudence to invalidate carefully considered regulatory statutes on First Amendment grounds. *See, e.g., Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010), and *McCutcheon v. Fed. Election Comm'n,* ___ U.S. ____, 134 S.Ct. 1434, 2014 WL 1301866 (2014) (invalidating in part the McCain-Feingold campaign reform act); and *Sorrell v. IMS Health, Inc.*, 564 U.S. ___, 131 S.Ct. 2653, 2011 WL 2472796 (2011) (invalidating complex state law regulating data mining).

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corporations as a class of speakers." *Id.* at 2230 (citing *Citizens United* at 340–41). *Reed*'s adoption of the Court's rationale in *Citizen's United* and *Sorrell* shows that speech cannot be limited just because it is based on an economic motive or promulgated by an economic actor. The Court has applied the heightened "strict scrutiny" even in cases involving commercial or economic interests. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (applying heightened "strict scrutiny" to a state statute restricting the sale, disclosure, and use of pharmacy records). That labor organizations, like corporations, are motivated, at least in part, by economic interests can no longer justify insulating Section 8(b)(4)(ii)(B) from strict scrutiny.[16]

3. Conduct-Based Rationale

Stevens' speech-plus argument also relies on the assertion that picketing is "a mixture of conduct and communication." Under this rationale, because Section 8(b)(4)(ii)(B) regulates peaceful secondary picketing as conduct — and not communication — content-based speech restrictions do not apply because Section 8(b)(4)(ii)(B) regulates conduct, not speech. The Supreme Court's First Amendment jurisprudence following *Safeco* has rejected such justifications.

Since *Safeco*, the Supreme Court has held that, like traditional speech, "communicative conduct" is subject to content-based heightened scrutiny as long as the restrictions on that conduct depend on the conduct's likely communicative impact. *See Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a state prohibition on flag burning and noting that because the government allows burning flags as a means to dispose of damaged flags, the challenged prohibition targeted the conduct's expressive aspects and not the conduct itself). There can be no question that Section 8(b)(4)(ii)(B)'s restrictions on peaceful consumer secondary picketing are directed towards the picketing's likely communicative impact where Section 8(b)(4)(ii)(B) permits picketers to urge consumers to patronize an establishment and prohibits picketers from persuading customers to boycott that same establishment.

[16] Moreover, even if labor picketing is fully protected as economic speech, it is more properly categorized as political speech. Employment and labor issues such as minimum wage, family leave, paid sick days, and the availability of good jobs are some of the most prominent issues in today's political campaigns and at the center of our local and national political debates.

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Moreover, since *Safeco* the Supreme Court has repeatedly rejected arguments that picketing can be restricted because it is conduct, not speech. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (holding that picketing of a military funeral was protected speech under the First Amendment and focusing only on the question of whether the speech, i.e., picketing, was of "public concern"); *McCullen v. Coakley*, 134 S.Ct. 2518, 2014 WL 2882079 (2014) (invalidating the provisions of Massachusetts law regulating conduct of picketers (remaining within a 35-foot buffer zone) on First Amendment grounds). Thus, peaceful secondary picketing can no longer be prohibited as conduct. Instead, as communicative or expressive conduct, it must be extended the First Amendment's full protections against content-based restrictions.

4. Harm-Based Rationale

The final rationale on which Section 8(b)(4)(ii)(B)'s restrictions have been justified is that they are aimed not towards picketers' communicative message, but rather towards the economic or social harms flowing from that conduct. Once again, the Supreme Court's First Amendment jurisprudence following *Safeco* has thoroughly discredited these arguments.

Under this jurisprudence, harms that flow from the "primary effects" of speech, i.e., harms that flow from what the speech communicates, are content-based restrictions. Harms that flow from the "secondary effects" of speech, i.e., harms that flow from the speech's non-communicative components, are content-neutral. Consistent with *Reed*, any regulation of a "primary effect" of speech, because it is content-based, is subject to strict scrutiny.

The harms flowing from picketing regulated by Section 8(b)(4)(ii)(B) are two-fold: (1) economic harms resulting from damage to a business as consumers choose to no longer patronize the establishment; and (2) social or emotional harms. Regulations targeting both types qualify as regulations of "primary effects" subject to strict scrutiny.

NAACP v. Claiborne Hardware, 458 U.S. 886 (1982), addresses the economic harm argument. In *Claiborne*, the NAACP organized a consumer boycott demanding, among other items, that stores serving the African-American community employ African-American clerks, thus advancing the community's economic interests. *Id*. at 900. As part of the picket, the NAACP posted uniformed observers, called "Black Hats," outside targeted stores. *Id*. at 903–04. The

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"Black Hats" noted which community members "crossed" the picket line and published the names of these individuals as "traitors." *Id*. at 904. The boycott was found to have caused economic harm to the businesses. The Mississippi Supreme Court upheld a determination that the picketers were responsible for an interference with business relations tort.

In overturning the lower court, the Supreme Court held that the First Amendment protected the consumer picketing. Even though the picketers exercised non-violent coercive pressure, including social ostracism, to cause economic harm, that harm flowed directly from constitutionally protected conduct. As a regulation of a primary effect, the law was subject to heightened scrutiny. The harms flowing from the picketing in *Claiborne* are indistinguishable from the harms flowing from secondary consumer picketing proscribed by Section 8(b)(4)(ii)(B).[17] Any attempt under Section 8(b)(4)(ii)(B) to regulate such economic harms must also be subject to strict scrutiny.

In cases following *Safeco,* the Supreme Court has held that the social harms flowing from picketing are also primary effects subject to heightened scrutiny. The Supreme Court has struck down restrictions even where picketing has caused deep offense, reasoning that because the emotional harm resulted from what the picket communicated, the First Amendment compelled heightened scrutiny. *See Snyder v. Phelps,* 562 U.S. 443, 454 (2011) (extending First Amendment protection to a homophobic protest of a military funeral in which picketers held up signs along the funeral route stating "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell").

Similarly, the Supreme Court has held that the tendency of expressive conduct to persuade others to take action, even harmful action, is a primary effect of speech, and thus, subject to strict scrutiny. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 394 & 396 (1992) (When "the 'chain of

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[17] *See also* James Gray Pope, *Labor-Community Coalitions and Boycotts: the Old Labor Law, the New Unionism, and the Living Constitution,* 69 TEX. L. REV. 889, 927–31 (1991) (discussing how any attempts to distinguish *Claiborne* from other forms of labor picketing become difficult "upon closer scrutiny" and noting the presence of economic objectives — job creation in a small local community and wage and benefit increases — in both instances).

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causation' … *necessarily* 'run[s] through the persuasive effect of the expressive component' of the conduct, [the law] regulates on the basis of the 'primary' effect of the speech – *i.e.*, its persuasive (or repellent) force"); *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2671, 2011 WL 2472796 (2011) (striking down a state law restricting the sale of pharmacy records revealing a doctor's prescribing practices due to the harmful effects such information could have on consumers and noting "[t]hat the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). Because Section 8(b)(4)(ii)(B) is seeking to prevent the actions consumers will take as a result of being *persuaded* by the Union's peaceful picket, Section 8(b)(4)(ii)(B) is regulating a primary effect of speech and thus should be subject to strict scrutiny.

In sum, under the Supreme Court's jurisprudence following *Safeco*, economic or social harms caused by peaceful consumer picketing or by persuading consumers to take action as a result of such picketing *cannot* justify Section 8(b)(4)(ii)(B)'s restrictions on persuading consumers to jointly take action with workers. To the contrary, Section 8(b)(4)(ii)(B)'s restrictions regulate the "primary effects" of speech and require strict scrutiny.

F. UNDER *REED,* SECTION 8(b)(4)(ii)(B)'S FACIALLY CONTENT-BASED RESTRICTIONS ON PEACEFUL SECONDARY CONSUMER BOYCOTTS CANNOT SURVIVE STRICT SCRUTINY.

Having established that Section 8(b)(4)(ii)(B) is a content-based regulation subject to strict scrutiny, the only remaining question is whether it survives such scrutiny. It does not.

Even assuming the government can establish a compelling interest in any one of the traditional bases for restricting secondary activity — "unimpeded or uninterrupted commerce," the "coercive 'shutting down' of a business," "coerced participation in labor strife," preventing "threats" or "violence," — Section 8(b)(4)(ii)(B) cannot survive because its restrictions are not narrowly tailored to those ends.

Section 8(b)(4)(ii)(B)'s restrictions are woefully under- and over-inclusive. Its restrictions are under-inclusive because the government cannot show that peaceful picketing by labor protesters to persuade consumers is any less threatening, harmful, or violent than similar consumer picketing by environmental, civil rights, anti-abortion, "Occupy," the Ku Klux Klan, or other groups. A "law cannot be regarded as protecting an interest of the highest order … when it leaves

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appreciable damage to that supposedly vital interest unprohibited." *Reed* at 2232 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). *See McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1441, 2014 WL 1301866 (2014) ("[T]he First Amendment protects flag burning, funeral protests, and Nazi parades – despite the profound offense such spectacles cause.")

They are also under-inclusive because they only ban picketing, while under *DeBartolo* protesters may achieve the very same objects through leafleting, bannering, and other forms of expression. *See Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010) (expanding *DeBartolo's* rationale to protect large stationary bannering); *Sheet Metal Workers Int'l Ass'n*, 356 NLRB No. 162 (2011) (expanding *DeBartolo's* rationale to protect a display of a large, inflatable rat). Under strict scrutiny, there is no defensible reason to ban picketing while permitting other forms of expression that achieve those same ends.

Finally, Section 8(b)(4)(ii)(B)'s restrictions are over-inclusive in that they encompass peaceful consumer picketing that in any other context the First Amendment would fully protect. If the Court has extended constitutional protection to picketers at a military funeral carryings signs that say "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell" (*Snyder*, 562 U.S. at 443), what justification is there under strict scrutiny for the Court *not* to extend those same protections to picketers standing on the sidewalk carrying signs that say "Neutral Employers Doom Nations?" or "Westgate is Doomed"? *Id.* at 448, 458. Similarly, if the Court extended First Amendment protections to picketers in a consumer picket targeting retail stores for discriminatory employment practices, who donned distinctive black hats and stood outside stores to use non-violent coercion to dissuade patrons from shopping at those stores, why would labor picketers, conveying the same message, be denied similar protections? *Claiborne*, 458 U.S. at 904. To argue that the Board's prohibition on peaceful secondary consumer picketing is narrowly tailored is untenable.

G. *REED'S* POLICIES SUPPORT ITS APPLICATION TO THE LAW OF SECONDARY CONSUMER BOYCOTTS.

Finally, it does not matter that this case involves facially content-based restrictions in the context of peaceful secondary picketing, while *Reed* involves facially content-based restrictions on

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a municipal sign ordinance. *Reed* does not indicate its rationale should be limited to municipal sign ordinances. To the contrary, the Court's opinion cites a broad range of First Amendment jurisprudence regulating campaign finance laws (*Citizens United v. Federal Election Commission)*, expressive conduct (*R.A.V. v. St. Paul),* and picketing (*Police Dep't of Chicago v. Mosley*), indicating *Reed's* broad reach.

Perhaps even more importantly, each of *Reed's* concurring opinions also supports applying strict scrutiny to Section 8(b)(4)(ii)(B).[18] We address the Alito concurrence first, because, as a practical matter, the *Reed* decision's limits flow from the majority opinion and the Alito, Kennedy, Sotomayor concurrence, which joined the majority. Justice Alito's concurring opinion emphasizes the fundamental policy reasons why content-based laws must satisfy strict scrutiny. He reasons that because content-based laws present some of the same dangers as viewpoint-based restrictions, content-based laws can have particularly pernicious impacts on the free exchange of ideas essential to challenging the *status quo* in a democracy: "Limiting speech based on its 'topic' or 'subject' favors those *who do not want to disturb the status quo.* Such regulations may interfere with democratic self-government and the search for truth." *Id.* at 2233 (emphasis added). Section 8(b)(4)(ii)(B)'s prohibitions on peaceful consumer picketing by workers are a classic example of a policy that favors those who do not want to disturb the *status quo*, and thus, are precisely the type of content-based laws Alito's concurrence cites as a constitutional priority.

Justice Breyer's concurring opinion cautions against applying strict scrutiny automatically to *all* content-based restrictions, citing some common-sense examples of "ordinary government activity" (such as requirements for prescription drug labels to state 'Rx only') that should not be disturbed. *Id.* at 2234–35. But even under Breyer's formulation, "content discrimination" is a "strong reason weighing against the constitutionality of a rule where a *traditional public forum*, or where *viewpoint discrimination* is threatened." *Id.* 2235 (emphasis added). Section 8(b)(4)(ii)(B) routinely prohibits what would otherwise be fully protected expressive activity in public fora such

[18] *Reed's* procedural posture is somewhat unusual in that although six Justices joined the opinion of the Court, three concurring opinions were filed — one by Justice Alito, one by Justice Breyer, and one by Justice Kagan.

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as sidewalks — indeed, that was the case here. Section 8(b)(4)(ii)(B) is also a classic example of viewpoint discrimination. Its restrictions apply only if picketers protest instead of endorse an employer, or protest an employer for its workplace as opposed to its environmental practices.

Justice Kagan's concurrence expressed concern that the "content-regulation doctrine" be administered "with a dose of common sense, so as to leave standing laws that in no way implicate its intended function." *Id.* at 2238. Yet even Kagan powerfully justifies applying strict scrutiny analysis to restrictions such as those in Section 8(b)(4)(ii)(B): "We apply strict scrutiny to facially content-based regulations of speech … when there is any 'realistic possibility that official suppression of ideas is afoot.' That is always the case when the regulation facially differentiates on the basis of viewpoint." *Id.* at 2237 (citations omitted).

In sum, the speech prohibited by Section 8(b)(4)(ii)(B)'s peaceful consumer boycott restrictions go to the central economic, social, and political questions of our time — one's ability to provide a decent living for oneself and one's family, the rights of immigrants, one's right to take time off to care for loved ones, to access to health care — and the role that consumers play in shaping those choices both for themselves and for others. *Reed* shows that more than 35 years after *Safeco*, the Court's First Amendment jurisprudence has evolved. Now is the time to reject the content-based distinctions that have vexed the courts since Section 8(b)(4)(ii)(B)'s enactment. For too long, there has been "an entirely separate, abridged edition of the First Amendment" applicable to labor speech.[19] *McCullen*, 134 S.Ct. at 2541 (Scalia, J., concurring). Labor picketers are entitled to the same First Amendment protections as the civil rights picketers in *Claiborne*, the religious picketers in *Snyder*, and every other type of peaceful picketer. Now is the time to recognize that Section 8(b)(4)(ii)(B)'s restrictions on peaceful consumer boycotts are unconstitutional.

[19] Of course, in this quote, Justice Scalia was referring to speech against abortion, not labor speech. Yet the Justice's fundamental concerns about speech being treated based on its content or subject-matter are applicable.

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IV. THERE WAS NO PICKETING.

The Charging Party continues to insist that the Respondent's conduct was picketing. This was the allegation of the Complaint. See amended paragraph, GC Ex. 2, ¶¶5(f)–(k). This allegation is not only puzzling but contrary to Board law, which has expressly resolved this issue.

In *Eliason & Knuth of Arizona, Inc.*, 355 NLRB 797 (2010), the Board squarely addressed this issue with respect to bannering activity. The Board concluded that bannering is not picketing.[20]

With respect to the beautiful inflatable critters, the Board addressed that issue in *Sheet Metal Workers International Association, Local 15*, 356 NLRB No. 162 (2011). The Board concluded that inflatable critters also do not constitute picketing.

The Board has ruled that neither bannering nor inflatable critters constitutes picketing. The complaint should be dismissed.

V. THERE IS NO CONDUCT THAT VIOLATES SECTION 8(b)(4)(i)(B).

The complaint alleged that the conduct would violate Section 8(b)(4)(i)(B). See Complaint ¶¶5(j) and (k). That allegation was maintained in the amended paragraph 5. See Complaint ¶¶5(l) and (m). Westgate appears to have abandoned any claim that the conduct violated this subsection.

In *Eliason & Knuth of Arizona, Inc.* and *Sheet Metal Workers International Association, Local 15, supra*, the General Counsel did not assert that there was any conduct that violated Section 8(b)(4)(i)(B). There was no evidence that employees were induced to cease work in either of those cases. Equally, there was no evidence whatsoever that any employee of Westgate or Nigro was induced or encouraged to commence "to engage in, a strike or a refusal in the course of his employment to … handle or work on any goods … or to perform any services…." There is no evidence whatsoever that any employee of either of those entities ever saw the critters or the banners. Nor is there any evidence that Nigro any other employer was at the Casino site.

[20] It did address the question of whether bannering could be "signal picketing." *Id*. at *11. There is no claim here that the bannering or any other activity was anywhere near any construction work, and therefore it cannot constitute signal picketing.

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The Board expressly recognized that banners may appeal to members of the public, including employees. It rejected the contention made here by Counsel for the General Counsel:

> Moreover, the notion that the banners operated not as ordinary speech, but rather as a signal automatically obeyed by union members must be subject to a dose of reality. The General Counsel asks us to simply and categorically assume, even in the absence of additional evidence of intent or effect, that when agents of a labor organization display the term "labor dispute" on a banner proximate to a workplace, it operates as such a signal. Our experience with labor relations in the early 21st century does not suggest such a categorical assumption is warranted. Here, moreover, the record is devoid even of evidence that any union members worked for any of the secondary employers or otherwise regularly entered the premises in the course of their employment. In these circumstances, we decline to place labor organizations' speech into such a special and disfavored category.
>
> In the absence of evidence that the Union did anything other than seek to communicate the existence of its labor dispute to members of the general public—which could, of course, as in *DeBartolo* and *Tree Fruits*, include employees of the secondaries and of others doing business with them—we find that the expressive activity did not constitute proscribed signal picketing merely because it involved the use of banners.

Eliason & Knuth of Arizona, Inc., *supra*, 355 NLRB 797 at *12 (footnote omitted).

The Board addressed this theory but did not expressly rule on it since the General Counsel (a Bush appointee) did not even assert a violation of Section 8(b)(4)(i)(B). *See Sheet Metal Workers Int'l Ass'n, Local 15*, *supra*.at * 6. There was no evidence in that case nor in this case that there was any "signal" to employees of any employer to cease work. *See also Local Union No. 1827, United Bhd. of Carpenters,* 357 NLRB No. 44 at *4 (2011) (no evidence that any employee responded to the banner).

No evidence was presented that there were employees of Nigro on the Casino site. No evidence was presented that there were employees of any other employer on the Casino site. See Complaint, ¶5(m). Nor is there evidence that there were any other persons engaged in commerce at the site. Although we assume there were employees of the Casino, we don't know the precise name of the casino. We don't know who the employer was. We don't know that it meets the

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Board's jurisdictional standards. We don't know if the employer is "Westgate," as defined in the complaint. We have no evidence that any employee of the Casino ever saw the activity.[21]

We note, moreover, that if Westgate's theory is that an employee may have seen the banner and decided to take action, this would raise serious constitutional problems.[22]

In any case, Section 8(b)(4)(i)(B) requires that the conduct "induce or encourage any individual…." No evidence whatsoever was presented of such actual inducement or encouragement, and therefore the 8(b)(4)(i)(B) allegation was properly dismissed.

Charging Party appears to have abandoned this claim.

VI. THE BANNERING IS LAWFUL PROTECTED ACTIVITY AND DOES NOT VIOLATE THE ACT.

A. BANNERING IS PROTECTED BY THE ACT.

The evidence establishes that the Respondent engaged in bannering. Charging Party appears to concede the bannering was lawful. The primary bannering activity was located at the entrance to the Casino on Paradise Road, where Riviera Street dead ended at Paradise. See GC Ex. 7(a)–(d) and GC Ex. 3(a) and (b). It is also undisputed that there was bannering at other locations. See GC Ex. 3(j) and (k), GC Ex. 11(g) and (m).[23]

The bannering was directed at immigrant labor issues. There is no evidence that there was any other message brought to the public's attention.

Eliason & Knuth of Arizona, Inc. and *Sheet Metal Workers International Association, Local 15, supra*, make it plain that that bannering was perfectly lawful. And, as described above, it is protected by the First Amendment.[24]

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[21] There is no evidence as to where any employee entrance was. As far as the record suggests, only the public driving on Paradise and other streets or patrons of the Casino would have seen the expressive activity.

[22] We recognize that if an inflatable critter or a banner is placed squarely in front of an employee only entrance, it may raise other issues. *See Iron Workers Local 386*, 325 NLRB 748 (1998), *reviewed by Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999) (leafleting interpreted to be a direct appeal to employees to engage in the work stoppage).

[23] Although the complaint alleges that the bannering occurred on private property, there is no evidence of such conduct. At best, there was dispute as to the one picture that shows one person with one foot on part of the alleged property of the Casino. See GC Ex. 3(f). That claim is silly, and we do not address it further.

[24] It is also protected by the constitutional provision protecting speech in Nevada.

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B. BANNERING IS PROTECTED BY NEVADA LAW.

Under the Nevada constitution, such expressive conduct has long been protected:

> The constitutional right to free speech … embraces every form and manner of dissemination of the ideas held by our people that appear best fitted to bring such ideas and views to the attention of the general populace, and to the attention of those most concerned with them. Peaceful picketing of an enterprise or business is the primary means by which laboring men make known their grievances. It is an appropriate mode of expression of views and opinions that is vital to their legitimate interests. Under the First and Fourteenth Amendments to the Constitution labor speech, like the expressions of businessmen, farmers, educators, political figures, religionists and all other citizens, must be given unfailing and unwavering protection by this court. …
>
> Free speech, which includes the right to peaceful picketing, must be given the greatest possible scope and have the least possible restrictions imposed upon it, for it is basic to representative democracy. *Thomas v. Collins*, 323 U.S. 516 (1945). It is not enough that the exercise of free speech may injure a business, or that the issues presented are conflicting or exaggerated, for no restraint can be imposed short of 'clear and present danger' of serious injury to society as a whole. *Thornhill v. Alabama*, 310 U.S. 88; *Schenck v. United States*, 249 U.S. 47 (1919).

State ex rel. Culinary Workers Union, Local No. 226 v. Eighth Judicial Dist. Court, 207 P.2d 990, 993–94 (Nev. 1949).[25]

Thus, it cannot be the subject of a Nevada trespass claim or other claim.

C. THE PROVISIONS OF 29 U.S.C. § 8(b)(4)(ii)(B) CANNOT CONSTITUTIONALLY BE APPLIED TO ACTIVITY ON A SIDEWALK.

> The sidewalk is a quintessential public forum. For "'[t]ime out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.'" *Frisby v. Schultz*, 487 U.S. 474, 480, (1988) (quotation omitted). They are the "archetype" of a traditional public forum. *Id.*

"Free speech is certainly incidental to pedestrian traffic, for, as the Supreme Court noted, streets and sidewalks are the archetype of a public forum. *Frisby*, 487 U.S. at 480, 108 S.Ct. 2495." *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 257 F.3d 937, 943 (9th Cir. 2001).

[25] Overruled in part and on other grounds by *Vegas Franchises, Ltd. v. Culinary Workers Union, Local No. 226*, 427 P.2d 959 (Nev. 1967).

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> The ability to restrict speech in public forums, whether traditional public forums or designated public forums, is "sharply circumscribed." *Perry*, 460 U.S. at 45, 103 S.Ct. 948; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir.1994) ("Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales." (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir.1984)) (alteration omitted)). …
>
> The quintessential traditional public forums are sidewalks, streets, and parks. *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (holding that the sidewalks adjacent to the Supreme Court were a public forum).[6] These areas have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). As a result, sidewalks, streets, and parks generally "are considered, without more, to be 'public forums.' " *Grace*, 461 U.S. at 177, 103 S.Ct. 1702; *see also Frisby v. Schultz*, 487 U.S. at 481, 108 S.Ct. 2495 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.").

Am. Civil Liberties Union v. City of Las Vegas, 333 F.3d 1092, 1098–99 (9th Cir. 2003) (footnote omitted). *See also, Sheet Metal Workers Int'l Ass'n, Local 15, supra* at *5.

Charging Party seems to have abandoned any claim that the bannering was unlawful. Nonetheless it was associated with the use of the critters and gave a constitutional dimension by addingthe message context to the critters themselves. It was an integral part of the First Amendment protection.

D. THE CLAIMS THAT THE BANNERS WERE ON PRIVATE PROPERTY ARE FRIVOLOUS.

Mr. DaSilva testified that his instructions were to keep off private property. (Tr. 277.) Mr. Froehlich claimed the heel of one banner holder was on the property line.[26] See footnote 19. He suggested that another banner holder was on private property because he could see his feet. (Tr. 102–03.) There was no evidence of any banner holder trespassing. Charging Party seems to have abandoned this claim.

[26] His testimony is hearsay. He was only looking at pictures; he was not there to observe the conduct.

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E. SUMMARY

The bannering was lawful and core First Amendment Conduct. The Region should be ashamed to have attempted to directly infringe on the rights guaranteed by the First Amendment.

VII. THERE WAS NO TRESPASS.

A. THERE IS NO TRESPASS ALLEGATION CONCERNING SECTION 8(b)(4)(i)(B) OR (ii)(B).

First, as noted above, the complaint in this matter did not allege that there was any trespass that violated Section 8(b)(4)(i)(B).[27]

Additionally, neither Nigro nor any other person other than the Casino is alleged to have any possessory interest, so Section 8(b)(4)(ii)(B) cannot apply.

B. THERE IS NO TREPASS UNDER NEVADA LAW.

In the case where there is an issue of trespass, the application of state law governs whether there is an actual trespass within the meaning of that state law. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 (1994); *Glendale Associates Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003); and *United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 962–63 (9th Cir. 2008). Here then, the Board must evaluate whether the conduct of the Respondent constituted trespass within the meaning of Nevada state law. The record is, of course, hobbled by any argument by the General Counsel as to what state law is or how it would apply in the circumstances of this case.

There is no general civil definition within Nevada law of trespass. It certainly cannot apply to conduct on the public sidewalk. Cf. *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2000) (holding that a temporary walkway was a public forum under Nevada law).

The Respondent acknowledged something that neither the Charging Party nor General Counsel brought to the attention of the Administrative Law Judge. There is a criminal statute that

[27] There can be no allegation that such trespass violates Section 8(b)(4)(i). The last amendment during the course of the hearing to allege trespass radically changed the theory of the General Counsel's case. And, as illustrated, this led the parties into a morass of property ownership issues, which were never resolved. The Respondent was plainly disadvantaged by this radical change in theory, and the allegations should be dismissed on this ground alone.

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defines trespass in Nevada. The criminal statute does not apply, however, and Nevada has not ruled that it governs trespass in any civil action.

Nonetheless, Nev. Rev. Stat. 207.200 defines trespass as follows:

> 1. Unless a greater penalty is provided pursuant to NRS 200.206, any person who, under circumstances not amounting to a burglary: (a) Goes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act; or (b) Willfully goes or remains upon any land or in any building after having been warned by the owner or occupant thereof not trespass, is guilty of a misdemeanor.

If one were to import that criminal statute to this proceeding, it would not apply.

1. <u>The provision of Nev. Rev. Stat. 207.200(1)(a) cannot be applied because it is preempted.</u>

The provision about entering land to "vex or annoy" cannot constitutionally be applied to secondary boycotting activity. This is plainly preempted. Here, the General Counsel alleged that the conduct was a secondary boycott, that the trespass was intended to "vex or annoy" and thus coerce the Casino. There was no allegation of any violence or other conduct that would take it out of the preemption doctrine. Thus, the statute is wholly preempted as to the alleged secondary activity.

The Seventh Circuit has addressed this circumstance and found any trespass claim to be preempted where the claim is that the trespass had a secondary objective. *Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 808 (7th Cir. 2009) ("Congress has provided an explicit means of redressing alleged violations of section 154(b)(4) through section 187 of Title 29. … Consequently, … section 187(b) *completely* preempts state-law claims related to secondary boycott activities described in section 158(b)(4); it provides an exclusive federal cause of action for the redress of such illegal activity.") While the *Smart* decision is dispositive, a recent decision from the Ninth Circuit also reaches the same conclusion.

Retail Property Trust v. United Brotherhood of Carpenters, 768 F.3d 938 (9th Cir. 2014), addresses exactly the issue before this Court. The question in *Retail Property Trust* was whether Section 303 of the LMRA, 29 U.S.C. § 187 "preempts state-law claims for trespass and private nuisance related to union conduct that may also constitute secondary boycott activity." 768 F.3d at

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942. In *Retail Property Trust*, the Carpenters Union protested the use of non-union subcontractors to renovate a store for a tenant of the mall owned by Real Property Trust. The Mall alleged that on several occasions Union members:

> came onto the Mall's privately owned common areas in front of the Urban Outfitters construction site and started a disruptive protest by marching in a circle, yelling, chanting loudly in unison, blowing whistles, hitting and kicking the construction barricade (which created a large hole in the barricade), and hitting their picket signs against the Mall railings, which created an intimidating and disquieting environment that interfered with the Mall's and its tenants' normal operation of business.

Id. at 943.

The mall also alleged other conduct such as provocative gestures toward patrons and other conduct that was more than just messaging or expressive activity. The union's actions included carrying out protests in front of two tenant stores with no relationship to the non-union contractor and a threat to "continue to picket and protest 'until such time that the Mall either forced Urban Outfitters to stop their construction work or until the Mall closed down the [Urban Outfitters] construction.'" *Id.* After receiving complaints regarding the activity, the Mall filed suit in state court alleging state law claims for trespass and nuisance and sought injunctive and declaratory relief. *Id.*

Following an extensive analysis of the applicable preemption doctrines, the Ninth Circuit agreed that the union's conduct in entering the mall had a clear secondary purpose, i.e., to pressure the mall owner and the other tenants to replace the non-union contractor. The facts in *Retail Property Trust* are parallel to this case. Like the mall in *Retail Property Trust*, Charging Party contends Respondent's dispute is with a non-union contractor and not with Westgate or Nigro. There is no substantive difference between the cases; both arise out of conduct that is clearly a secondary boycott.

/ / /

The Ninth Circuit concluded that the conduct of the union in *Retail Property Trust* was not preempted because of the nature of the trespassory conduct. After finding that the preemption

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doctrine "does not so fully occupy the fields such that any claim related to secondary boycotts must be brought under Section 303 or not at all," *Id*. at 956, the Ninth Circuit recognized the State's right to regulate conduct is limited to a "small class of cases" involving union secondary activity that is violent or threatens public order. *Id.* at 956, 958–59.

The Ninth Circuit rejected the Seventh Circuit's statement in *Smart* that any claim of secondary boycotting was totally preempted as overbroad, *Retail Property Trust*, 768 F.3d at 955, and instead limited *Smart.* It is that distinction which applies to this case. Under the rationale in *Smart*, GWP's claim would plainly be preempted and prohibited by federal law. But *Retail Property Trust* makes it clear that the preemption question is determined by the nature of the conduct:

> Second, and more importantly, the particular facts of this case suggest that it will work no interference with the purposes of federal labor law. The Mall claims not the right to quash *all* protest activity by the Union—an expansive claim that would present a much harder question with respect to *Machinists* preemption—but only the right to prevent Union members from 'yelling, chanting loudly in unison, blowing whistles, hitting and kicking [a] construction barricade ... and hitting their picket signs against the Mall railings.' Such threatening activity is not a 'weapon of self-help' that Congress intended to leave available to unions. *Cf. Farmer v. United Bhd. of Carpenters & Joiners, Local 25,* 430 U.S. 290, 299, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) ("Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute" (citations omitted)). The sort of "peaceful" protest activities that *Machinists* preemption *does* squarely protect from state interference are left available by the Mall's relatively modest time, place, and manner restrictions. *See Morton,* 377 U.S. at 259–60, 84 S.Ct. 1253.

Retail Property Trust, 768 F.3d at 961 (footnote omitted).

The Ninth Circuit carefully distinguished cases involving violence, disruption and other conduct from peaceful expressive activity. *Id*. at 952, 953, 956–59, 961. What defeated preemption in *Retail Property Trust* was that the Union's conduct involved an intrusion into the mall and violation of time and place and manner restrictions in ways that disrupted the operation of

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the mall.[28] However, the decision makes it clear that if the conduct had been merely expressive activity and peaceful it would have been preempted. *Id.* at 958–59 (state law claims addressing antitrust or economic harm without violence preempted).

Thus, the Nevada criminal trespass statute is preempted to the extent it would regulate conduct that is meant to "vex and annoy" Westgate with an unlawful purpose. And, to the extent any other Nevada law would call into question the alleged trespass because it had an unlawful secondary object, it is preempted.

2. Nev. Rev. Stat. 207.200(2) requires notice before there is a trespass.

The remaining language of the statute requires there to be "a sufficient warning against trespassing." See Nev. Rev. Stat. 207.200(2), defining a sufficient warning.

Here, there was no warning whatsoever that the placement of the banner or critters was trespassing.

Mike DaSilva testified that at one point a security guard (we do not know by whom he was employed) said that "they don't belong here." (Tr. 294.) No explanation was given, and no claim was made that there was any trespass. Nor was there any evidence as to whether the reference was to the bannering on the sidewalk, the critters, or anything else. It is not a sufficient warning under state law.

Contrary to this, of course, is the fact that the police reviewed the situation and told the Union, "[Y]ou guys are good." (Tr. 282.) Moreover, Mr. Froehlich toured the site repeatedly. He never said a word about trespass. The Director of Security visited the site, and he never said a word. No one said anything about trespass.

At no time was the Union put on notice that it was trespassing as the statute requires.

[28] Thus, a claim against the union for physical intrusion onto the mall for expressive conduct would have been preempted if it had complied with reasonable time, place and manner restrictions. *See, e.g.*, *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 754 (Cal. 2007) (malls "may enact and enforce reasonable regulations of the time, place and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall, but they may not prohibit certain types of speech based upon its content, such as prohibiting speech that urges a boycott of one or more of the stores in the mall"); *Best Friends Animal Soc'y v. Macerich Westside Pavilion Prop. LLC*, 122 Cal.Rptr.3d 277, 282 (Cal. Ct. App. 2011).

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The only communication that might possibly be considered notice of trespass is General Counsel Exhibit 4(a), and there was no evidence as to precisely when that letter was received.[29]

The fact that there was no warning is illustrated by the fact that the Charging Party put up chains later on March 12 across the utility cutouts where the critters had been peacefully engaged in expressive activity. See GC Ex. 8(f) and (g). The fact that the Charging Party had to put up the chains with a sign illustrates that no one could reasonably believe that the utility cutouts were private property or at least asserted private property.[30]

In summary, there was no notice of trespass until, at the earliest, March 11, and the critters were promptly removed. Thus, even under Nevada law, applying the criminal statute, there was no trespass.

C. THE RECORD HAS NOT ESTABLISHED THE CHARGING PARTY HAS OWNERSHIP IN THE PROPERTY.

There was additionally no trespass because the letter of March 10, advising of the trespass, GC Ex. 4(a), was not sent by the owner of the property. The letter was sent on behalf of the Charging Party in this case. The fact is, however, that the Charging Party is not the owner of the property. The owner, according to Mr. Froehlich, is a different entity known as "Westgate, 3000 Paradise." (Tr. 232.) Of course, that claim is contradicted by the final map filed with the County. See GC Ex. 9(a), indicating that the owner is "Westgate Las Vegas Resort LLC, a Delaware limited liability company."

There may be some relationship between these entities, but certainly the Charging Party, on whose behalf the March 10 letter was written, is not the owner of the property.

---

[29] We do not know what time it was sent on March 10. Assuming, however, that it was received on the next day at some point, all of the critters were removed by March 12. Thus, the Union, as far as this record reveals, promptly responded to the "Notice of Trespass" by removing the critters. The Respondent did not stipulate when it was received, and Counsel for the General Counsel did not seek to prove how it was delivered. Nor was it offered for the truth of the matter such as that it was sent by email. Thus the reference on the document as to how it was sent was not admitted for the truth of how it was sent.

[30] Respondent had used utility cutouts before without incident.

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D. THE UNION'S CONDUCT DID NOT CONSTITUTE TRESPASS.

Here, the Union made every effort to engage in activity on public property.[31] The police came out and reviewed the conduct. For the first five days, no one provided any notice claiming there was a trespass even though there were agents of the Charging Party present throughout the process. The letter that was sent claiming trespass was not written on behalf of the owner of the property. The Nevada local authorities who visited the site found there was no problem. There has been no state court resolution of the question of whether any of the property in dispute was owned by anyone and, if so, who owned the property. Finally, it is clear the utility cutouts were regularly opened to the public. The public could stop at a utility cutout just as they could walk on the sidewalk. The record utterly fails to establish any trespass.

E. TRESSPASS WITHOUT MORE CONDUCT DOES NOT CONSTITUTE COERCION WITHIN THE MEANING OF SECTION 8(b)(4)(ii)(B).

The ALJ found that the alleged trespass without more did not constitute unlawful coercion. Even if the critters were on the Casino's property and the Charging Party had a sufficient property right to exclude, there was no meaningful coercion. The critters did not in any way interfere with the operations of the Charging Party. They were placed in a way to avoid any interference with any traffic or business. The Board rejected the contention that expressive conduct is coercive in *Eliason & Knuth of Arizona, Inc.*, *supra*:

> In answering the question before us, we turn first to the text of the Act. In order for conduct to violate Section 8(b)(4)(ii)(B), the conduct must "threaten, coerce, or restrain." There is no contention that the Respondent threatened the secondary employers or anyone else. Nor is there any contention that the Respondent coerced or restrained the secondaries as those words are ordinarily understood, i.e., through violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business. A reading of the statutory words "coerce" or "restrain" to require "more than mere

[31] There is no evidence of any other trespass. Mr. Froehlich claims one shoe of one person was on the Charging Party's property. (Tr. 83 and GC Ex. 3(f).) It does not look like the heel of one person is on the decorative rock at that moment nor is it clear the heel is on any property line. Nor is there any way to tell since the property line was not marked. That heel is protected by the First Amendment as discussed above. It is difficult to understand how that heel is coercive. One envisions the foot of the oppressor standing on working people as true oppression not the reverse. We wait to see if the General Counsel's Brief asserts that this heel is a violation of the Act. Mr. Froehlich's adamant claim the banner holder was on private property (the property line which there is no way to establish with certainty) undermines his credibility.

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> persuasion" of consumers is compelled by the Supreme Court's holding in *DeBartolo*. 485 U.S. at 578. Here, however, there is nothing more.

Id. at *5 (footnote omitted). The Board also stated:

> The Board has found non-picketing conduct to be coercive only when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations. Blocking ingress or egress is one obvious example of such coercive conduct. In a variety of other instances, the Board and the courts have recognized that disruptive, non-picketing activity directed against secondaries can constitute coercion. For example, a union that engaged in otherwise lawful area-standards publicity violated Section 8(b)(4)(ii)(B) by broadcasting its message at extremely high volume through loudspeakers facing a condominium building that had hired the primary employer as a subcontractor. Carpenters (Society Hill Towers Owners' Assn.), 335 NLRB 814, 820-823 (2001), enfd. 50 Fed.Appx. 88 (3d Cir. 2002) (unpub.). The common link among all of these cases is that the union's conduct was or threatened to be the direct cause of disruption to the secondary's operations. There was no such disruption or threatened disruption here. The banner holders did not move, shout, impede access, or otherwise interfere with the secondary's operations.

Id. at *12 (footnote omitted).

Here, the Union's conduct avoided all disruption. Mere trespass of the nature alleged here on utility cutouts is not coercive.[32] The ALJ correctly determined that the alleged trespass did not amount to unlawful coercion.

Charging Party, in its exceptions, rests its case on the theory that trespass must constitute coercion. But here, it was not the trespass, it was the message which was coercive. That is why Section 8(b)(4)(ii)(B) is unconstitutional.

VIII. RAT 2 WAS BRIEFLY RESTING ON A DRIVEWAY WHERE THE GATE WAS CLOSED AND LOCKED; IT WAS RESTING ON AN AREA WHERE PEDESTRIANS WOULD CROSS THE DRIVEWAY.

The General Counsel made a special argument as to the critter identified as Rat 2. We used the nomenclature to describe this expressive and wonderful critter. Rat 2 is pictured in GC Exhibit 11(d). Charging Party appears to have abandoned this claim.

[32] That doesn't mean that the owner (whoever that is) is without a remedy in state court for an injunction against trespass.

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It is undisputed that Rat 2 was briefly present on March 6. We know it was seated without moving or breathing on a driveway. See GC Ex. 7(d), (e), and (f).

We also know that the Rat was seated on a right of way granted to the Monorail. (Tr. 156–57). The Monorail is a private transportation system. See http://www.lvmonorail.com/corporate/. Thus, the Charging Party does not have complete control over that location, and there was no showing that it had sufficient possessory control to allow it to assert a trespass claim against Rat 2.[33]

It is also clear that this is a public right of way because it is an extension of the sidewalk. Although the sidewalk ran down Paradise and curved at the driveway, pedestrians would normally have to cross the driveway to continue on the sidewalk going south. Thus, in effect, it is a public sidewalk, and pedestrians are allowed to walk across the driveway entrance proceeding southward.[34] This is a quintessential public forum.

Finally, the evidence became clear that during the brief period in which the beautiful rat was seated on the driveway, the driveway entrance was closed.[35] The driveway entrance was locked throughout the entire time the rat was there. (Tr. 274, 286.)[36] There was no contrary evidence.[37]

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[33] GC Ex. 10(a)–(k) is dated 2002 and 2003, long before Westgate took over any property interest. This easement is with an entity unrelated to Westgate that took over in 2015, thirteen years later. See date on GC Ex. 9. There has been no showing that Westgate has any property interest in this location where Rat 2 was resting.

[34] General Counsel has not established that the area of a driveway leading to the street is not a public right of way. Clark County requires a Pedestrian Access Agreement over such a driveway, otherwise property owners could keep pedestrians off curb-return driveways. See, http://www.clarkcountynv.gov/Depts/public_works/development/Pages/faq.aspx.

[35] The General Counsel may resort to pointing out that the Rat 2's tail appears to be resting on the decorative rocks off the driveway. We cannot tell whether the tail was also resting on the sidewalk that curved around the driveway. See curved sidewalk on GC Ex. 12(a). The location of the tail does not constitute a violation of Section 8(b)(4)(ii)(B) because Rat 2's tail was resting on private property out of the way of anyone. There is no evidence that the tail was coercive. That tale will not be sustained.

[36] GC Ex. 12(d) clearly shows the gate locked and closed. It was taken the same day as GC Ex. 12(c), which shows Rat 2.

[37] Once again, there is no conduct that violates Section 8(b)(4)(i)(B), because there was no evidence that any employee sought to use that entrance or that it was an entrance exclusively or primarily used by employees. Indeed, the entrance was an event entrance, but there is no evidence of any event on the day in question, which was March 6.

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In summary, Rat 2 sat for a brief period of time on the easement granted to the Monorail in front of a locked gated in an area where pedestrian access was required by local law; this brief appearance cannot be considered coercive within the meaning of Section 8(b)(4)(i)(B). Charging Party has not excepted to the ALJ's finding on this activity.

IX. THE CRITTERS

There were four attractive critters placed in what the parties described as "utility cutouts." Those four critters were supporting the Union's banner, which focused solely upon the immigration practices of a contractor that had worked at the premises. Those four critters are described below:

- A roach (see GC Ex. 11(a)–(c));
- A rat (GC Ex. 11(g)–(i);
- A pig (GC Ex. 11(j)–(l)); and
- A fat cat (GC Ex. 11(m)–(o)).

The General Counsel argued that placing the inflatable critters on the utility cutouts constituted coercion.[38]

First, there was no evidence of coercion except for the testimony of Mr. Froehlich that he (the casino) did not like the message. Mr. Froehlich testified that the concern was with the "negative perception with these rats." (Tr. 221–22.) As we noted above, *Eliason & Knuth of Arizona, Inc.*, *supra*, rejected the theory that this conduct, without some disruption of the casino's business, is coercive.

There was no possessory interest that was interfered with proposed by either the Charging Party or Counsel for General Counsel. It was wholly an issue of messaging.

For the reasons expressed above, the Board cannot regulate this conduct because of the message. See *Eliason & Knuth of Arizona, Inc.*, *supra*.

[38] General Counsel failed to explain how this conduct could coerce Nigro or any other person other than the owner of the property. Thus, to the extent the conduct does not coerce non-property owners, it cannot violate Section 8(b)(4)(ii)(B).

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There was, furthermore, no trespass under any state law principle for the reasons expressed above.

The Union was given permission by the Water District employees to place the critter on the utility cutouts. (Tr. 264, 284.)[39]

The critters were resting on utility easements. That is not disputed. Nothing in the record allows the charging party exclusive control over those easements.[40] The easements were not introduced by the Counsel for the General Counsel.

Indeed, the only easement concerned Monorail, and reflected the owner is the LVH Corporation, and there is no evidence that the Charging Party is the successor to LVH Corporation. Rather, this is an easement between the Monorail system and LVH.[41] This easement, therefore, has nothing to do with establishing any ownership on anything other than the location of Rat 2. It is limited to the grant of an easement to the Monorail system by an entity that has no connection with the casino or the Charging Party which is shown on this record.

Rather, what we know is based on the testimony of the surveyor. We know that there is a blanket utility easement as well as the specific utility easements on which the critters rested. Neither the Charging Party nor the General Counsel put into evidence those easements, and they therefore failed to establish that the Charging Party (again misidentified) had sufficient state law control over these easements to claim that the critters were engaged in trespass as to its possessory interest.[42] The ALJ made no finding that the cutouts were private property of anyone. ALD p 6.

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[39] Sufficient agency was established by the fact that these were Water District employees. Whether or not they held management positions, they were still Water District employees. The burden is not on the Respondent to prove that they lacked general agency. If their authority was limited, the burden would be upon the party asserting that limitation to the agency to establish that limitation.

[40] GC Ex. 10 is not a utility easement. None was introduced, but we know the location of the critters was subject to various easements. The General Counsel has failed to prove that the Casino had any property right or any such right sufficient to give it the power to claim that someone was trespassing.

[41] This exhibit proves, moreover, why Rat 2 was not on property controlled by the Charging Party but rather was on property on an easement controlled by the Monorail system.

[42] Under Nevada law, a critter is not a person who can engage in trespass. No one sought to prove that anyone who is a person subject to a trespass statute was actually on the property. Although the Supreme Court has expanded the definition of person, it has not gone so far as to hold that such a critter is a person.

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Finally, since these utility cutouts were wholly open to the public, they were, in effect, public just like the sidewalk. They only became apparently private property after the critters were taken down and given a rest, when the chains were placed across the utility cutouts on March 12. The ALj found that these cutouts were open to the public until obstructed by Westgate. ALJD p 6: 13-12. Thus, to the extent the public was invited before that, there could be no trespass when the critters, as part of the public, occupied those cutouts.

We conclude by just noting that placing the critters on the utility cutouts avoided any interference with pedestrians on the sidewalk. Thus, because the Union believed it did not have authority to place the critters on the sidewalks, and because placing the critters on the utility cutouts interfered less with public access on the sidewalks, the Union's object was not unlawful.

For these reasons, the four critters who were seated peacefully and quietly on the utility cutouts did not constitute unlawful secondary boycotting activity. They were not coercive within the meaning of Section 8(b)(4)(ii)(B). *Eliason & Knuth of Arizona, Inc.*, *supra*.[43]

X. THERE WAS NO COERCION BECAUSE CHARGING PARTY TOOK NO ACTION TO ADVISE RESPONDENT OF THE ALLEGED TRESPASS UNTIL MARCH 10.

It is undisputed that the expressive activity began March 6. Although Mr. Froehlich and Mr. Laughman repeatedly visited the activity and took pictures, nothing was said to the Respondent claiming the activity was a trespass. As noted, one guard made a vague comment but did not suggest there was trespass. Charging Party could have notified the Respondent on the first day, called the police, sought a restraining order or filed the charge with the NLRB. It could have immediately put up private property signs or assigned security personnel to those areas. It took no action, essentially allowing the activity until March 10, when its lawyer sent GC Exhibit 4(a). There is no evidence as to when Local 872 received it. It is undisputed that the alleged trespass ceased as of March 12. ALJD p 6:19-21. Assuming Local 872 learned of the claim of trespass on March 11, the critters went home by the end of that day and have not returned.

[43] We submit that neither Counsel for the General Counsel nor Counsel for Charging Party had read the case even though it was a Region 28 case.

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If Charging Party took no action to advise Local 872 that it was coerced and allowed the critters to remain on what was an open area without any private property signs, it could not have been coerced. In effect, the Charging Party condoned at least the location of the critters.

XI. THE SECONDARY BOYCOTT LAW CANNOT BE APPLIED TO THIS CONDUCT BECAUSE OF THE RELIGIOUS FREEDOM RESTORATION ACT.

It is clear that the dispute here was one of abuse of immigrant workers. The duty to help fellow human beings, especially ones in vulnerable and disadvantaged positions, is a central belief propounded by virtually all religions. It is a core issue for people who have religious views to support and protect immigrant workers. The ALJ refused to address this issue.

The Religious Freedom Restoration Act must be applied in this case. Here, there is a conflict between the Religious Freedom Restoration Act and the secondary boycott provision of 29 U.S.C. § 158(b)(4)(ii)(B). We believe that the First Amendment protects that right to such conduct as occurred here. Nonetheless, to the extent that there is a conflict, the Religious Freedom Restoration Act requires that the secondary boycott law be interpreted to allow this religious exercise of expressive activity regarding a core religious issue.

XII. THE RELIGIOUS FREEDOM RESTORATION ACT EXTENDS TO THE CORE RELIGIOUS ACTIVITY OF HELPING OTHER WORKERS, AND THE NLRA HAS TO BE APPLIED TO PROTECT THIS RELIGIOUS RIGHT.

Section 7 protects the right of employees to engage in concerted protected activity. That extends to asking for help in work place issues from other employees. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014). Such concerted activity is a central principle of religion. Section 7 activity is a core religious activity. The solidarity principle drawn from this case is the essence of religion. Protected concerted activity for mutual aid and protection is core religious activity. Here, the expressive activity of Respondent is such protected activity. To the extent Section 8(b)(4)(ii)(B) is applied to limit that activity, it cannot do so in a manner that interferes with the religious rights of Local 872 and its members.

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In 1993, Congress enacted the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb–2000bb-4. It was enacted in response to a Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872 (1990), which many saw as restricting the exercise of religion.

The Act in relevant part provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

The statute does not apply to state government. *See City of Boerne v. P. F. Flores*, 521 U.S. 507 (1997).[44]

The RFRA has been the subject of litigation. It, however, came boldly to the attention of the public in *Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).*

> Hobby Lobby operates according to "Christian" principles; Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. 723 F.3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate

[44] Congress subsequently amended the RFRA to apply, in part, to certain state actions. See Religious Land Use and Institutionalized Persons Act of 2000, 42. U.S.C. § 2000cc, *et seq*.

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> that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137.

Burwell v. Hobby Lobby Stores, Inc., *supra*, 134 S.Ct. at 2766.

Moreover, the Court noted:

> Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens[owners of Hobby Lobby] and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See, App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

Id.

The Supreme Court in *Burwell* held that the application of a portion of the Affordable Care Act imposes substantial burden on the religious beliefs of the owners of Hobby Lobby. It did so because there was a regulation requiring that contraceptives be provided over the religious objections of the owners. The Court held that this "contraceptive mandate imposes a substantial burden on the exercise of religion." *Id*. at 2779.

The Court then went on to state:

> The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A).

Id. at 2754.

Recently, the Tenth Circuit described the application of the RFRA:

> Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir.2013) (en banc), *aff'd sub nom. Hobby Lobby,* —— U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675, the ACA

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> required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir.2014), a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir.2010), a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).
>
> The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S.Ct. 853, 2015 WL 232143 (2015), which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim. The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. 135 S.Ct. at 861. The Court ultimately approved this compromise in its ruling. *Id.* at 867.

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, No. 13-1540, 2015 WL 4232096, at *14 (10th Cir. July 14, 2015)

That Court went on to explain in some detail the RFRA application:

> RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Supreme Court held that burdens on religious exercise are constitutional under the Free Exercise Clause if they result from a neutral law of general application and have a rational basis. *Id.* at 878–80; *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir.2002). Congress enacted RFRA to restore the pre-*Smith* standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. *Smith*, 494 U.S. at 882–84; *see also Hobby Lobby*, 134 S.Ct. at 2792–93 (Ginsburg, J., dissenting). Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). *See* 42 U.S.C. § 2000 bb(b)(1).
>
> By restoring the pre-*Smith* compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise jurisprudence. *See id.; Hobby Lobby*, 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith.* There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence...."). Notably, pre-*Smith* jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected

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the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy,*

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

476 U.S. 693, 707, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986). As we discuss at greater length below, the pre-*Smith* standards restored by RFRA permitted the Government to impose *de minimis* administrative burdens on religious actors without running afoul of religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion." *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir.2001); *see* 42 U.S.C. § 2000bb–1(a). The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means available." *Hobby Lobby,* 723 F.3d at 1142–43. The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 1126 (quotations and citation omitted). "This burden-shifting approach applies even at the preliminary injunction stage." *Id.*

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby,* 723 F.3d at 1125–26 (quotations and alterations omitted); *see also Yellowbear,* 741 F.3d at 55 (applying this framework to RLUIPA); *Abdulhaseeb,* 600 F.3d at 1315 (same). As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner ... correctly perceived the commands of [his or her] faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *see Hobby Lobby,* 723 F.3d at 1138–40. But courts do determine whether a challenged law or policy substantially

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> burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.
>
> RFRA states the federal government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb–1(a). We must "give effect ... to every clause and word" of a statute when possible. *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955). Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch).
>
> We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning. *See Menasche*, 348 U.S. at 538–39. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, *supra*, at *17–18 (footnote omitted).

To the extent that the provisions of Section 8(b)(4)(ii)(B) are interpreted to be a prohibition against collective activity, it not only burdens but prohibits such collective activity, which is a core religious activity. Here, there is clear tension between the right to help the fellow worker, which is protected by the NLRA, and the limitation imposed by the application of Section 8(b)(4)(ii)(B). The RFRA teaches that Section 8(b)(4)(ii)(B) must give way to the religious right to help fellow workers.

To the extent Section 8(b)(4)(ii)(B) is interpreted to be a prohibition against this kind of expressive activity on a religious issue, it must give way to the RFRA.

Nor is there any governmental interest. The NLRA and Norris-LaGuardia Act defeat the argument that there is any governmental interest in forbidding or burdening group action. They serve to protect such activity. The First Amendment limits any governmental interest in limiting speech.

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Finally, the application of Section 8(b)(4)(ii)(B) cannot meet the final test; by disallowing all group actions, it does not reflect a "least restrictive" means of accomplishing any compelling governmental interest in preserving the First Amendment right of protest.

> The least-restrictive-means standard is exceptionally demanding, see City of Boerne, 521 U.S., at 532, 117 S.Ct. 2157, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§ 2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest" (emphasis added)).

Burwell v. Hobby Lobby Stores, Inc., *supra,* at 2780,

Section 8(b)(4)(ii)(B) could easily be interpreted not to apply to consumer picketing. Carving out this exception, which is limited, would be the "least restrictive" means of achieving the goals of the Section 8(b)(4)(ii)(B) without interfering with the religious rights of employees.[45] Thus, Section 8(b)(4)(ii)(B) would apply in other regards but not to this form of activity.

Religions are replete with references to the workplace. The religious exercise to help fellow workers is a fundamental tenet of every religion. Whether we use the phrase "brotherly love" or otherwise, every religion encourages workers to help each other to make themselves and the workplace better.[46] We have attached summaries from various religions that emphasize the core principle that helping fellow workers is a central religious act. See Attachment A.

In *Burwell v. Hobby Lobby Stores, Inc.,* Hobby Lobby brought its lawsuit to challenge a portion of the Affordable Care Act because it claimed that statute burdened its religious exercise. The Court found, against the government's arguments, that the Affordable Care imposed a substantial burden on religious activity and found that the government could not establish that it

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[45] Section 8(b)(4)(ii)(B) already carves out picketing where a union is certified and the employer is refusing to bargain. *See UFCW Local 1996*, 336 NLRB 421 (2001). And, of course, the Supreme Court has cut back the reach of the provision as to consumer picketing and handbilling, thus narrowing the statute. See also the proviso to Section 8(b)(4)(ii)(B).

[46] This is just a religious version of the solidarity principle explained by the Board in *Fresh & Easy*, *supra*. This is the application of the most fundamental religious principle: the Golden Rule. See https://en.wikipedia.org/wiki/Golden_Rule. If some fellow employees ask for help regarding a workplace issue, the other employee should help the first. The General Counsel's theory violates the Golden Rule.

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imposed the least restrictive means of establishing any governmental interest.

The RFRA applies to supersede any governmental restriction on the free exercise of such religious activity. To the extent that those laws are interpreted in any way to burden the religious exercise of helping fellow workers, the Religious Freedom Restoration Act requires that super strict scrutiny be applied.

Here, the National Labor Relations Act governs the right of employees to engage in concerted activities. It is nothing more than workers getting together to help themselves and their families. Thus, there is nothing inconsistent with the application of Section 7, but any limitation on the application of Section 7 would be contrary to the religious views of those who want to help fellow workers. Section 8(b)(4)(ii)(B) cannot be read to limit that right. Cf. *Snyder v. Phelps*, *supra*.

There is no doubt that Section 8(b)(4)(ii)(B), if applied to foreclose concerted activity, would substantially burden the exercise of religion by those employees who wanted to work together to help their brothers and sisters in the workplace. It would also burden those employees of other employers. Here, it would burden their right to protest unfair treatment of immigrants, a core issue of all religions.

The burden shifts at that point under the RFRA for the government to establish that that substantial burden "is in the furtherance of compelling government interest." Here, there is no governmental interest. The government can simply allow, consistent with the First Amendment, employees to present their claims concertedly by engaging in boycotting.

For these reasons, the Religious Freedom Restoration Act applies to this case.[47] The

[47] The religious exemption principles that we derive from the RFRA are already in place and have been long recognized for those who have some religious objection to joining a supporting union. *See* 29 U.S.C. § 159. There are some religions that have the basic tenet that adherents should not join or support unions. Title 7 also recognizes that an accommodation is sometimes necessary. *See EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990) (because employee's religious objection was to union itself, reasonable accommodation was required allowing him to make charitable donation equivalent to amount of union dues, instead of paying dues). Religious principles often govern and require an accommodation. *EEOC v. Abercrombie & Fitch Stores Inc.*, 135 S.Ct. 2028, 2015 WL 2464053 (2015). This case represents this principle: there are those who believe that it is a basic religious tenet to help fellow workers. Title VII thus requires an accommodation. Workers who believe it is a religious exercise to help their fellow workers must similarly be accommodated.

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provision of Section 8(b)(4)(ii)(B) cannot be applied to interfere with the religious right of employees to help other employees by prohibiting employees from jointly working together to improve the workplace and to help fellow workers with respect to wages, hours and working conditions by boycotting.

XIII. CONCLUSION

For the reasons suggested above, the Board should find that the Union's conduct was wholly expressive and protected by the First Amendment. Section 8(b)(4)(ii)(B) cannot constitutionally be applied to this expressive activity. The complaint should be dismissed.

Fees should be awarded pursuant to 42 U.S.C. § 1988(b) (fees awarded in any action or proceeding in which RFRA invoked). The Region should be rebuked for attempting to interfere with First Amendment Rights and the rights under the RFRA. The Board should furthermore order that the Charging Party be permitted to place the critters on the utility cutouts without interference and to post an appropriate notice that it will not interfere with the rights of workers to engage in such protected activity. Finally, the Regional Director should be required to read the Decision to the staff of Region 28 in order that they understand the rights of workers under the First Amendment and the Religious Freedom Restoration Act.

Dated: October 29, 2015

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/s/ *David A. Rosenfeld*
By: DAVID A. ROSENFELD
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CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On October 29, 2015, I served the following documents in the manner described below:

BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ANSWER TO BRIEF TO EXCEPTIONS OF CHARGING PARTY

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 29, 2015, at Alameda, California.

/s/ *Karen Scott*
Karen Scott

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